SUPREME COURT, U. S.

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NO. 553

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

MIDWEST-RALEIGH, INC., THE TRAVELERS INSURANCE COMPANY, INTERSTATE ENGINEERS & CONSTRUCTORS, INC., and THE FIDELITY & CASUALTY COMPANY OF NEW YORK et al., Petitioners,

v.

EASTERN GAS & FUEL ASSOCIATES, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

EASTERN GAS & FUEL ASSOCIATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Midwest-Raleigh, Inc., The Travelers Insurance Company, Interstate Engineers & Constructors, Inc., and The Fidelity and Casualty Company of New York, respectfully pray for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on March 7, 1967.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of West Virginia is not printed herein inasmuch as it is printed in the certified appendix (94a-112a) accompanying this Petition. Also the opinion is reported at 253 F. Supp. 954. The opinion of the Court of Appeals is reported at 374 F.2d 451 and may be found in the appendix hereto at 1a-8a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 7, 1967. Rehearing was denied on May 1, 1967. An extension of time to August 30, 1967 for filing this petition was granted on July 27, 1967.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

"Purchaser [Midwest and Interstate] will protect and indemnify Eastern against loss or damage to property and injury and death to persons resulting from, arising out of and incident to the performance of this contract."

Is the foregoing indemnity provision clear and definite enough to extend its protection to the sole, negligent acts of Eastern, the indemnitee; and in so holding did the Court of Appeals:

1. Contrary to the requirements of *Erie,* fail to follow West Virginia substantive law on the interpretation of indemnity agreements;

2. Disregard the District Court's findings of fact as to the circumstances surrounding the performance of the contract which contained the indemnity provision; and

3. Commit error in holding that an indemnity agreement worded in general terms will be applied to an indemnitee's own negligence since by its terms it does not *exclude* such shifting of responsibility.

STATEMENT OF THE CASE

To accomplish the dismantling of an abandoned plant, Eastern Gas and Fuel Associates (hereinafter "Eastern" or "indemnitee") contracted with Midwest-Raleigh, which in turn subcontracted with Interstate ("Purchaser" or "indemnitor"). The dismantling contract contained the provision that:

> "Purchaser will protect and indemnify Eastern against loss or damage to property and injury and death to persons resulting from, arising out of or incident to the performance of this contract."

The plant was located over a 285-foot-deep abandoned shaft connected to the old coal workings below, which shaft had been capped by Eastern with a 46-ton, 18-inch-thick cement slab several years earlier when the coal in that immediate area was mined out.

Before the work commenced, inquiry from Interstate's president who knew of the shaft and that the underground coal seam to which it connected was gaseous, resulted in the reassuring response from Eastern's mine superintendent of "Don't worry about the shaft—the shaft is filled and sealed" with noncombustible, inert materials.

In fact, the shaft was not filled. Consequently, while Interstate was in the process of tearing down the old plant, an explosion of trapped methane gas occurred in the shaft; and two of Interstate's employees were killed and several others injured.

Wrongful death and personal injury actions were instituted against Eastern — the indemnitee — by the aggrieved parties and one such action has gone to

judgment, following which Eastern, by this declaratory judgment proceeding, seeks indemnification from Interstate under the above indemnity provision. The District Court denied indemnification, holding (1) that by virtue of the jury verdict in the death action, Eastern's own negligence in allowing the methane gas to accumulate without warning to Interstate's employees was the sole proximate cause of the explosion, and (2) that the indemnity provision in question was not clear and definite enough to safeguard Eastern from the effects of its own negligence thus established.

The Court of Appeals reversed, holding that the agreement was clear and definite enough to indemnify Eastern against all liability arising from performance of the contract — despite the fact that Eastern's own false representations about the condition of the shaft over which it had exclusive control caused the deaths and injuries. In so holding, the Court of Appeals adopted the novel view that, even though Eastern — the indemnitee — had prepared the contract, before Interstate could avail itself of the defense it asserted against indemnification, *Interstate* must point to specific terms which qualify or limit the extent of its obligation under the contract. In other words and contrary to all prior decisions elsewhere in the country on this point, the Fourth Circuit Court of Appeals now holds that an indemnity provision, general and "unqualified" in its terms, will be extended to protect the indemnitee against its own negligence and that in the Fourth Circuit, at least, it is now up to the *indemnitor,* who did not prepare the agreement, to limit or qualify the extent of indemnification in order to prevent its application to the indemnitee's own sole negligence!

In no other case in this country has a court ever so held. In fact, all courts in recent years — after toiling for a time some years ago with whether such provisions, even if clearly worded, were against public policy —have consistently held, with insignificant variations, that it takes clear,[1] definite,[1] unequivocal,[2] and decisively[3] worded language, *to be strictly construed*[4] *against the drafter*[5] *(Eastern),* before liability for the indemnitee's sole negligence will be shifted to the indemnitor.[6]

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1. *Bowlby-Harmon Lumber Co. v. Commodore Services, Inc.,* 144 W.Va. 239, 107 S.E.2d 602 (1959).

2. *Ocean Accident & Guarantee Corp. v. Jansen,* 203 F.2d 682 (8th Cir. 1953).

3. *Boston Metals Co. v. S/S "Winding Gulf",* 349 U.S. 122, 99 L.Ed. 933 (1955).

4. *Newport News Shipbuilding and Drydock Co. v. U. S.,* 226 F.2d 137 (4th Cir. 1955), citing *Boston Metals Co., supra.*

5. *Southern Ry. Co. v. Coca-Cola Bottling Co.,* 145 F.2d 304 (4th Cir. 1944).

6. Annotation, 175 A.L.R. 8, 29 *et seq.*

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

Petitioners rely upon the following reasons why the petition for a writ of certiorari sought herein should be granted:

1. **Compelled by Erie to follow West Virginia substantive law, the Court nonetheless disregarded the state law in holding the indemnity provision to be clear and definite enough to protect the indemnitee for the consequences of its own negligence.**

A. *West Virginia Rule of Strict Construction.*

As Mr. Justice Frankfurter said in his concurring opinion in *Boston Metals Co. v. S/S "Winding Gulf"*, 349 U.S. 122, 99 L.Ed. 933, 936 (1955):

> "Release-from-liability clauses generally * * * are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the language used expresses such to be the understanding of the contracting parties. Even when such a clause undeniably alters the normal relationship between tug and tow as to some aspects of liability for negligence, it is not to be construed to impose every consequence of the tug's negligence upon the tow unless the clause decisively requires this result. * * *" (p. 936, L.Ed.)

Perhaps one of the better summarizing statements of the rule is found, understandably, in an annotation in 175 *A.L.R.* commencing at page 8 and entitled "Limiting Liability for Own Negligence":

"* * * where the parties fail to refer expressly to negligence in their contract such failure evidences the parties' intention not to provide for indemnity for the indemnitee's negligent acts. While this rule of construction is expressed by the courts in various forms, all of them in effect say: 'A contract of indemnity will not be construed to indemnify a person against his own negligence where such intention is not expressed in "clear and unequivocal terms."' In support of this rule it has been stated that general words alone do not necessarily import an intent to hold an indemnitor liable for damages resulting from the negligence of the indemnitee and that no inference therefrom can establish such intent. The words of the contract will be scrutinized closely to discover whether such an intent is actually revealed in them and every presumption is against such intention. In the absence of explicit language to the contrary, courts will not interpret an indemnity agreement as a promise by the indemnitor to save the indemnitee harmless on account of the latter's own negligence." (pp. 30-32)

Even the Fourth Circuit Court of Appeals recognized the applicability of the rule when in *Newport News Shipbuilding and Drydock Co. v. U. S.*, 226 F.2d 137 (1955) it observed:

"* * * Not only is the rule well settled that contracts providing exemption from liability for negligence should be strictly construed; * * *" (p. 142)

As support for this statement, the Fourth Circuit Court referred — among other cases — to the *Boston Metals* case and the annotation in 175 *A.L.R.*

See also the Fourth Circuit opinion in *Southern Ry. Co. v. Coca-Cola Bottling Co.*, 145 F.2d 304 (1944).

This being a diversity case, the Court of Appeals was compelled to look to West Virginia law to determine whether this rule of strict construction applied in that state; and, while there is no direct holding on the point, the West Virginia Supreme Court of Appeals spoke obliquely to the question in *Bowlby-Harmon Lumber Co. v. Commodore Services, Inc.*, 144 W.Va. 239, 107 S.E.2d 602 (1959):

> "* * * Moreover, to relieve a party from liability for his own negligence by contract, language to that effect must be *clear and definite.* See *Winkler v. Appalachian Amusement Co., supra; Brophy v. Fairmont Creamery Co.*, 98 Neb. 307, 152 N.W. 557; *Carstens v. Western Pipe and Steel Co. of California*, 142 Wash. 259, 252 P. 939; *Cerny-Pickas & Co. v. C. R. Jahn Co.*, 4 Ill. App.2d 164, 123 N.E.2d 858; *Hardware Mutual Insurance of Minnesota v. C. A. Snyder, Inc.*, 3 Cir., 242 F.2d 64." (p. 248, W.Va.) (Our emphasis)

As an indication of the West Virginia Supreme Court's thinking on the issue, we quote at length from the *Carstens* case to which the West Virginia opinion refers:

> "The thing for us to do is to determine what the parties to the lease had in mind when they provided that the leased property was to be sur-

rendered in good condition, damage by fire excepted. Did that clause mean that the lessee was to be relieved from fires which were the result of its own negligence? We ought not to come to that conclusion, unless the lease *definitely and certainly* so expresses itself. It would be natural and customary for the lessee to want to escape liability for purely accidental fires and for the lessors to be willing to grant that relief, but it would not be natural that the lessors would be willing to release the lessee from damages caused by its own active negligence. Such a concession would hardly be looked for in a contract between business men. If the parties intent such a contract we would expect them to so state in *clear terms.* We think the doctrine of the case of Price & Co. v. Union Lighterage Co., 6 B.R.C. 119, is quite correct when it says that—

> 'When there is a clause in a contract which is "capable of two constructions, one of which will make it applicable where there is no negligence on the part of the carrier or his servants, and the other will make it applicable where there is such negligence, it requires *special words* to make the clause cover nonliability in case of negligence. * * *
>
> That being so, the principle that to exempt the carrier from liability for the consequences of his negligence there must be words that make it clear that the parties intended that there should be such an exemption is applicable, * * * and the learned trial judge was right in holding that the contract does not

> exempt the defendants from liability for their own negligence.'" (Our emphasis) (p. 941, Pac.)

In the *Cerny-Pickas* opinion to which the West Virginia Supreme Court also referred is found this statement:

> "A contract exempting party from liability for negligence is not favored by law and is strictly construed against party relying thereon, and *clear and explicit* language in contract is required to absolve party from such liability." (Syl. 4, p. 859, N.E.2d) (Our emphasis)

Thus the West Virginia Court requires "clear and definite" or "clear and explicit" language, or "clear terms."

The *Bowlby-Harmon* case appears to be the controlling one on this issue, and it is urged that as applied to the language in the indemnity provision under study, the Court of Appeals failed to follow that case and the language of the cases upon which *Bowlby-Harmon* relied; *e.g., Carstens v. Western Pipe and Steel Co.*, 142 Wash. 259, 252 Pac. 939 ["definitely and certainly so expresses"]; and *Cerny-Pickas & Co. v. C. R. Jahn Co.*, 4 Ill. App.2d 164, 123 N.E.2d 858 ["clear and explicit language in contract is required to absolve party from such liability."].

B. *Rule of Construction Against Drafter*

The Court of Appeals said (App. p. 7a):

> "* * * It is reasonable to assume that Midwest [indemnitor] would have insisted upon the

addition of some limitations and exceptions to the broad language of the indemnity provision if it had not intended to assume *all liability.*" (Our emphasis)

This statement by the court is an unwarranted reversal of general, including this Court's and West Virginia, law that when the words of a contract are ambiguous or susceptible to different interpretations, such ambiguities are to be resolved against the party who drew the contract and selected its terminology and nomenclature. *Southern Ry. Co. v. Coca-Cola Bottling Co.,* 145 F.2d 304 (4th Cir. 1944). The Fourth Circuit would in effect reverse the "well known and worthy maxim of our law" (*Southern Ry. Co., supra,* p. 307) and cast the burden upon the opposite party to make specific the indefinite language; and certainly this is not the type of case which calls for such a reversal of the sound logic of prior law.

As examples of how other courts in indemnity situations have handled this question, see *Vinnell Company v. Pacific Electric Railway Co.,* 52 Cal.2d 41, 340 P.2d 604, 607 (1959), where the California court observed:

> "'The defendant itself wrote the provision into the contract for its own benefit. It could have plainly stated, if such was the understanding of the parties, that the plaintiff agreed to relieve it in the matter from all liability for its own negligence. As it did not do so, we resolve all doubt, as we should in favor of the plaintiff, and hold that it was not the intent of the parties to give to the contract as written the effect claimed by the company.'"

In *U. S. Fidelity & Guaranty Co. v. Mason & Dulion Co., Inc.*, 145 So.2d 711 (Ala. 1962), the court said:

"Considered in its entirety, the contract between contractor and subcontractor, as to the point here in question, is not specific or precise. It does not clearly indicate to us just what the parties did intend with respect to indemnity for a loss caused by the contractor's negligence. We are of opinion that the contract can be fairly and reasonably construed to support the contentions of appellee equally as well as it can be construed to support the contentions of appellant. *The contract is one which illustrates the soundness of the rule which requires an ambiguous contract to be construed against the party who prepared it.* The party preparing the contract had opportunity to choose appropriate language to protect his interest and we must presume that he did so to the fullest extent he deemed necessary. The instant contract was prepared by the contractor and, as to the ambiguity now at hand is to be construed against the contractor." (p. 717, So.2d) (Our emphasis)

In the Fourth Circuit Court of Appeals, in *Southern Ry. Co. v. Coca-Cola Bottling Co.*, 145 F.2d 304, 307 (1944):

"This contract was drawn by Southern. It was signed, as so drawn, by Coca Cola without the change of a word. When the words of a contract are ambiguous, it is a well known and worthy maxim of our law that such ambiguities should be resolved against the party that drew the contract and selected its terminology and nomenclature."

In this case, inasmuch as the demolition agreement under which Eastern and Interstate were operating was prepared by Eastern (R.I-a, 97a), all of its provisions and particularly the vague and indefinite statement regarding indemnification must be construed most strongly against Eastern, and be presumed not to cover Eastern's own negligence. As the cases everywhere else hold, all doubt is to be resolved against the drafter of the agreement.

2. In holding the indemnity agreement to be clear and specific enough to protect the indemnitees against its own negligence, the Court of Appeals violated Federal Rule 52(a) in disregarding the District Court's significant and dispositive findings of fact, from which the District Court concluded otherwise.

In the course of its Memorandum Opinion and Supplemental Opinion, the District Court made the following findings of fact:

1. The indemnity provision was drawn by Eastern. (R.I-a, 97a).
2. Interstate exercised due care in the dismantling process. (R.I-a, 107a).
3. Interstate and its employees were working on the assumption that the shaft was filled with non-combustible material. (R.I-a. 110a).
4. Their use of cutting torches or working on or around the slab did not show a lack of extreme care on their part. (R.I-a, 110a).

5. The contract provisions in regard to extreme care were intended to cover surface prevention of fire, accident, etc. (R.I-a, 111a).

6. The contract was never intended to burden Interstate with using extreme care to prevent a gas explosion below the slab. (R.I-a, 111a).

7. The custody and control of the shaft were in the hands of Eastern. (R.I-a, 111a).

In its opinion (Appendix, 6a and 7a), the Court of Appeals stated:

> "* * * Under West Virginia law, 'when the language used in a written instrument is susceptible of more than one interpretation, courts will look at the surrounding circumstances which exist at the time a contract in writing was entered into, the situation of the parties, and the subject mater of the instrument * * *.' *Kanawha Banking & Trust Co. v. Gilbert,* 131 W.Va. 88, 107-108, 46 S.E.2d 225, 236 (1947). The contract in question was to be performed in a mining area, by its nature potentially highly dangerous. That the parties anticipated the danger is manifested by the contract requirement that Midwest (and its successor Interstate) perform 'with all safety precautions' and 'exercise extreme care.' Under such circumstances, Midwest (and subsequently Interstate) agreed without limitation to indemnify Eastern against liability, and to maintain insurance to cover any such liability. It is reasonable to assume that Midwest would have insisted upon the addition of some limitations and exceptions to the

broad language of the indemnity provision if it had not intended to assume all liability."

In the first place, the Court of Appeals' observation that this contract was to be performed in an area by its nature potentially highly dangerous is an observation not warranted by the record. Quite to the contrary, the District Court found that the reference to "extreme care" in the contract was limited to a concern over above-surface hazards and that the contract was never intended to burden Interstate with using extreme care to prevent the very thing which caused the ultimate liability of Eastern to arise, *i.e.*, the below-surface shaft explosion over which shaft Eastern had exclusive custody and control.

Thus, the Court of Appeals not only ignored the District Court's findings but made opposite and contrary findings to support its claim that "the surrounding circumstances" justified its extension of the indemnity provision to protect Eastern against its own negligence.

What the Court of Appeals appears to have done is to have converted the "extreme care" reference in the contract relating to the conduct of Interstate in performing the dismantling contract above the surface — described by the Court of Appeals as the "surrounding circumstances" — into an unlimited broadening of the indemnity provision, which indemnity provision admittedly was an insignificant portion of the dismantling contract. The Court of Appeals ignored entirely the District Court's finding that Eastern had the exclusive control of the below-surface shaft, which shaft had nothing whatsoever to do with the dismantling process.

To petitioners this District Court finding, *this* "surrounding circumstance" is far more significant as a fact than the Court of Appeals' reliance upon the obligation of Interstate to use extreme care in dismantling the plant to prevent *surface* fires, accident, etc. As the District Court found, the contract was never intended to burden Interstate with using extreme care to prevent a gas explosion *below* the slab. By the use of the terms "extreme care" regarding conduct in an unrelated area, surely the parties could not have intended that this cover Eastern's calpable conduct in intentionally concealing the existence of the *unfilled below-ground* shaft.

The Court of Appeals, having failed to label the District Court's findings as clearly erroneous or unsupported by the record, cannot thus ignore them and make opposite and contrary findings — which themselves are unsupported by the record.

In passing, the Court of Appeals cites the contract provision requiring insurance against "any liability" which may arise under the indemnity provision, as an indication that the indemnity provision effected unlimited coverage. This it held, in spite of the fact that the insurance which was obtained and was accepted as sufficient by Eastern (App. 2a) — a clear indication of the parties' interpretation of the insurance provision — merely insured the indemnitor's contractual obligation under the indemnity provision in question.

As noted in *American Agric. Chem. Co. v. Tampa Armature Works,* 315 F.2d 856 (5th Cir. 1963):

> "* * * the underlying insurance which insures compliance with the indemnity agreement merely

guarantees compliance by the assured (the indemnitor) of whatever obligations the indemnity contract prescribes. The presence of insurance then is really question-begging: if the indemnity contract subjects the indemnitor to liability, the underwriter is also liable; if it does not, then the underwriter has no liability except to defend the baseless charge asserted under the indemnity agreement." (p. 861)

Although the Court of Appeals has in effect held otherwise, the parties' own interpretation of the insurance provision in compliance therewith should control. To hold that a provision requiring insurance *ipso facto* converts a vague, indefinite indemnity provision into one which covers *any and all* possibilities, appears to amount to "Boot Straps" or "Whole Cloth" law.

Finally, in its opinion (App. 7a) the Court of Appeals said that unless the agreement is construed to indemnify Eastern against its own negligence, the provision would be meaningless. To so hold amounts to a disregard of all prior cases wherein courts have held that indefinite indemnity provisions do not protect the indemnitee against his own negligence. As observed in *Batson-Cook Company v. Industrial Steel Erectors*, 257 F.2d 410 (5th Cir. 1958):

"The phrase stressed heavily is indeed broad. But the broad, all-inclusiveness of language used is itself one of the indicia which the law regards as insufficient. The purpose to impose this extraordinary liability on the Indemnitor must be spelled out in unmistakable terms. It cannot come from reading into the general words used the fullest

meaning which lexicography would permit. * * *" (p. 413)

The Court of Appeals has thus held that *in all instances* the *only* meaning to be given to imprecise indemnity provisions is to protect the indemnitee against his own negligence, since the common law through implied indemnification protects the indemnitee otherwise than for his own primary negligence. Not only does this completely destroy the effect of the prior cases on the point (which number in the hundreds: 175 A.L.R. 8 and 24 A.L.R.2d 329), but it also improperly assumes that the indemnitee and the indemnitor are totally familiar with the law of implied indemnity — when from the cases it seems fairly obvious that not even many lawyers understand this field of the law.

Furthermore, the necessity of asking the question of "If it doesn't cover the indemnitee's own negligence, what does it cover?" points up the very vice in attempting to apply this vague provision to cover the indemnitee's own negligence: if it cannot be determined from its own context, it is not "clear and definite" enough to extend it to cover such an extraordinary situation as we have here; and it imposes upon one's sense of fair play to assume that the indemnitor by agreeing to the provision *written by the indemnitee* intended it to cover the type of conduct of which the indemnitee here was guilty: namely, intentionally concealing a lethal hazard the existence of which was known only to the indemnitee.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,750.

Eastern Gas and Fuel Associates,
Appellant,
versus
Midwest-Raleigh, Inc., a corporation, The Travelers Insurance Company, a corporation, Interstate Engineers & Constructors, Inc., a corporation, The Fidelity and Casualty Company of New York, a corporation, Alma Jean Jones, Administratrix of the Estate of Robert L. Jones, Deceased, Evelyn Elizabeth Ice, Administratrix of the Estate of Gay W. Ice, deceased, Arlie Spry, William J. Ice, and William E. Zirkle,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, AT FAIRMONT.

SIDNEY L. CHRISTIE, DISTRICT JUDGE.

(Argued January 12, 1967. Decided March 7, 1967.)

Before J. SPENCER BELL and WINTER, Circuit Judges, and RUSSELL, District Judge.

Russell L. Furbee (Thomas J. Whyte and Furbee, Hardesty, Critchfield and Whyte on brief) for Appellant, and Willis O. Shay (Steptoe & Johnson on brief) for Appellees.

J. SPENCER BELL, Circuit Judge:

This is a declaratory judgment action brought by Eastern Gas and Fuel Associates, which seeks an adjudication of its right to indemnity or contribution for its liability arising out of a gas explosion that occurred at its Federal No. 1 coal mine at Grant Town, West Virginia. Eastern appeals from a district court judgment holding that it was entitled to neither indemnity nor contribution.

On April 30, 1962, Eastern entered into an agreement to sell to defendant Midwest-Raleigh, Inc., an old cleaning plant, tipple structure, aerial tram, and coal hoist building located at the Grant Town coal mine. By the terms of the contract Midwest was to furnish all labor, supervision, equipment, tools, etc., necessary to dismantle and remove the equipment and structures. Midwest agreed to "exercise extreme care in the performance of this work to prevent fire and/or other damage or accident. . . ." and to "protect and indemnify Eastern against loss or damage to property and injury and death to persons resulting from, arising out of or incident to the performance of this contract." It was further agreed that Midwest would maintain bodily injury and property damage liability insurance to cover any liability arising from performance of the contract; defendant Travelers Insurance Company wrote the insurance policy for Midwest. In accordance with the contract, certificates of insurance were submitted to Eastern's insurance manager before any work pursuant to the contract was commenced. Thereafter, with the approval of Eastern, Midwest employed Interstate Engineers and Constructors, Inc., as subcontractor to per-

form the work required by the contract between Midwest and Eastern, and Interstate adopted the terms and conditions of that contract. For the protection of Midwest, Interstate acquired from defendant Fidelity and Casualty Company of New York an insurance policy in material respects identical to the Travelers policy taken out by Midwest pursuant to its agreement with Eastern.

On July 16, 1962, an explosion occurred in the area of the coal mine where Interstate's employees were working, and as a result two of Interstate's employees were killed and three others injured. Interstate's operations at the coal mine site centered around a 46-ton concrete slab which covered an open mine shaft, and the explosion apparently resulted from an accumulation of methane gas under the slab. Four suits arising out of that accident were commenced against Eastern in a Pennsylvania federal district Court and subsequently were transferred to the United States District Court for the Northern District of West Virginia.[1] Eastern brought Interstate and Midwest into the suits as third-party defendants, claiming that it was entitled to indemnity under its contract for any liability arising

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1. Civil Action File No. 63-508 was brought by the three injured Interstate employees against Eastern for personal injury damages; Civil Action File No. 63-509 was a wrongful death action brought against Eastern by the administratrix of Robert L. Jones, an Interstate employee who was killed by the explosion; Civil Action File No. 63-510 was a wrongful death action brought by the administratrix of Gay W. Ice, the other Interstate employee killed by the explosion; and Civil Action File No. 63-511 was a suit for property damage brought by Interstate against Eastern.

from the accident.[2] This declaratory judgment action had been commenced in the same West Virginia district court prior to transfer of the four cases originally brought in Pennsylvania, but, by agreement of counsel with concurrence of the court, hearing of this case was postponed until the question of Eastern's liability had been determined in one of the damage actions. On May 10, 1965, trial was begun of one of the wrongful death actions against Eastern. Although Interstate and Midwest were formally third-party defendants in that case, neither took an active part in the litigation because it was agreed by counsel that submission of the contractual indemnity issue to the jury might be confusing. It was agreed that the indemnity issue would be reserved for submission to the court after trial of the wrongful death case if the jury verdict was adverse to Eastern. Obviously a verdict in favor of Eastern would have avoided the indemnity issue raised by the third-party complaint.

Judgment was entered aganst Eastern based upon a jury verdict in the amount of $25,000.00; the judgment was subsequently paid by Eastern. The case at bar was by agreement of the parties submitted to the court without a jury upon the pleadings of the declaratory judgment action and the record of the wrongful death action. The court held that Eastern was not entitled to recover from Midwest and Interstate under the indemnity clause of the contract because that clause could not be construed to indemnify Eastern against its own negligence. The court further held that it was

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2. Of course, only Midwest was a third-party defendant in the suit brought by Interstate as plaintiff. See note 1 *supra*.

conclusively bound by the jury determination in the wrongful death case that the negligence of Eastern was the *sole* proximate cause of the accident and that Interstate was free from contributory negligence. Eastern challenges the correctness of both of the district court's determinations.

It is Eastern's position that the following provision of the contract indemnifies it against any liability arising from performance of the contract, whether or not that liability arose as a result of its own negligence:

> "Purchaser [Midwest and Interstate] will protect and indemnify Eastern against loss or damage to property and injury and death to persons resulting from, arising out of or incident to the performance of this contract.
>
> "Purchaser, during the period of this contract will maintain Bodily Injury Insurance in limits of not less than $500,000. per accident, and property damage of not less than $500,000. to cover any liability including collapse arising out of the removal and dismantling, clean-up work, loading and transporting of the items stated herein."

In construing the indemnity provision, we must apply the law of West Virginia. There are no applicable statutes, and we have found only one statement of the West Virginia Supreme Court of Appeals relevant to the construction of such provisions: "[T]o relieve a party from liability for his own negligence by contract, language to that effect must be clear and definite." *Bowlby-Harmon Lumber Co. v. Commodore Services, Inc.*, 144 W. Va. 239, 248, 107 S.E.2d 602, 607 (1959)

(dictum). The district court was apparently of the opinion that specific language stating that Eastern will be indemnified against its own negligence is necessary to fulfill the "clear and definite" requirement. We cannot agree.

Some courts have held that in order for an indemnitee to be indemnified against his own negligence, the indemnity contract must contain express language to that effect. *E.g., Schwartz v. Merola Bros. Constr. Corp.*, 290 N.Y. 145, 48 N.E.2d 299 (1942); *Southern Pac. Co. v. Layman*, 173 Ore. 275, 145 P.2d 295 (1944). See Annot., 175 A.L.R. 8, 28-32 (1948), and cases cited therein. Others have held that something less than an express statement is required; the language of the contract must merely show a clear intent of the parties that the indemnitee's negligence be indemnified. *E.g., Jacksonville Terminal Co. v. Railway Express Agency, Inc.*, 296 F.2d 256 (5 Cir. 1961); *Cacey v. Virginia Ry.*, 85 F.2d 976 (4 Cir. 1936); *Stern v. Larocca*, 49 N.J. Super. 496, 140 A.2d 403 (1958). Although the West Virginia Court of Appeals has not decided the question, indications are that it would adopt the latter view.

In the case of *Borderland Coal Co. v. Norfolk & W. Ry.*, 87 W. Va. 339, 104 S.E. 624 (1920), the West Virginia court held that contracts of indemnity against one's own negligence are not against the public policy of West Virginia. In deciding that question, the court implicitly approved as sufficient to indemnify against the indemnitee's negligence the following contractual provision: "To indemnify and save harmless the railway company for or on account of any loss or damage which may at any time in any manner arise to the sec-

ond party from the use or operation of the said siding or spur track by the railway company." *Id.* at 340, 104 S.E. at 624. We find no indication that West Virginia would not follow its usual rule of contract construction — ascertainment of the intent of the parties as "gathered from the entire language of the instrument"[3] — to determine whether a contract clearly and definitely indemnifies the indemnitee against his own negligence.

In our view, the contract is "clear and definite" in its indemnity of Eastern against all liability arising from performance of the contract, despite its own negligence. The contract unqualifiedly provided that Midwest, and its successor Interstate, were to indemnify Eastern for "injury and death to persons resulting from, arising out of or incident to the performance" of the contract and to provide insurance to cover "*any* liability." (Emphasis added.) Under West Virginia law, "when the language used in a written instrument is susceptible of more than one interpretation, courts will look at the surrounding circumstances which exist at the time a contract in writing was entered into, the situation of the parties, and the subject matter of the instrument. . . ." *Kanawha Banking & Trust Co. v. Gilbert,* 131 W. Va. 88, 107-08, 46 S.E.2d 225, 236 (1947). The contract in question was to be performed in a mining area, by its nature potentially highly dangerous. That the parties anticipated the danger is manifested by the contract requirement that Midwest (and its successor Interstate) perform "with all safety precau-

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3. *Bowlby-Harmon Lumber Co. v. Commodore Services, Inc.,* 144 W.Va. 239, 247, 107 S.E.2d 602, 607 (1959).

tions" and "exercise extreme care." Under such circumstances, Midwest (and subsequently Interstate) agreed without limitation to indemnify Eastern against liability, and to maintain insurance to cover any such liability. It is reasonable to assume that Midwest would have insisted upon the addition of some limitations and exceptions to the broad language of the indemnity provision if it had intended to assume all liability.

Moreover, unless construed to indemnify Eastern, whether or not negligent, the provision would be meaningless. See *Union Pac. Ry. v. Ross Transfer Co.*, 64 Wash.2d 486, 392 P.2d 450 (1964). If Interstate were primarily negligent and Eastern were not negligent at all or merely secondarily negligent, Eastern would in law have a right to indemnity from Interstate without the necessity of an agreement to that effect. *Restatement, Restitution* § 96 (1937); *Restatement, Agency (Second)* § 401 (1958). It is a general tenet of contract law that a construction which gives meaning to all words and provisions of a contract is favored.

Because we have concluded that Eastern is entitled to indemnity from Midwest and Interstate, we do not reach the question whether or not the district court was correct in giving res judicata effect to the jury's finding in the wrongful death case that the explosion was caused by the sole negligence of Eastern.

The judgment of the district court is reversed, and the case is remanded for entry of judgment in accordance with this opinion.

Reversed.

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

NO. 553

OCTOBER TERM, 1967

MIDWEST-RALEIGH, INC., THE TRAVELERS INSURANCE COMPANY, INTERSTATE ENGINEERS & CONSTRUCTORS, INC., and THE FIDELITY & CASUALTY COMPANY OF NEW YORK et al., Petitioners,

v.

EASTERN GAS & FUEL ASSOCIATES, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

NO. 553

OCTOBER TERM, 1967

MIDWEST-RALEIGH, INC., THE TRAVELERS INSURANCE COMPANY, INTERSTATE ENGINEERS & CONSTRUCTORS, INC., and THE FIDELITY & CASUALTY COMPANY OF NEW YORK et al., Petitioners,

v.

EASTERN GAS & FUEL ASSOCIATES, Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

The Respondent, Eastern Gas & Fuel Associates, respectfully prays that a Petition for a Writ of Certiorari by Petitioners, Midwest-Raleigh, Inc., The Travelers Insurance Company, Interstate Engineers & Constructors, Inc., and The Fidelity & Casualty Company of New York, to review the judgment of the United States Court of Appeals for The Fourth Circuit entered in this cause on March 7, 1967, be denied.

OPINIONS BELOW

The opinion of The United States District Court for The Northern District of West Virginia will be found in the certified appendix (94a-112a), and it is reported in 253 F. Supp. 954. The opinion of the Court of Appeals is reported in 374 F. 2d 451 and will be found in the appendix to the Petitioners' petition at 1a-8a.

STATEMENT OF THE CASE

Respondent desires only to amplify the statement of the case as contained in the petition in that the statement therein presented wholly fails to include matters and things known to Interstate, and which should have controlled their activities particularly relating to safety precautions and measures that should have been employed and used by them in the dismantling of the plant. It assumes in paragraph 4 of Petitioners' Brief that Harold Sargeant, who was the active head of Interstate, was wholly and entirely innocent and had no knowledge of the dangerous operation under his control. It assumes as a fact that Sargeant was told that the shaft was filled, etc. The preponderance of the evidence is otherwise. The physical set up makes such a lack of knowledge by Sergeant an impossibility. Mr. Sargeant knew this was a gaseous mine, as he stated at T. Page 40 (26a), that he knew this was a gaseous mine. He stated the concrete pad, or slab, was practically the "center of the operations of the job", (T. 58) (28a), and that his men dropped debris and material on the slab — (T. 59) (29a). He testified he had not seen the trap door on top of the slab because his own men had deposited so much debris on the slab—(T. 63) (30a).

The testimony of Harold Sargeant shows that despite his training and experience as a mining engineer, his familiarity with the existence of the shaft, the gaseous nature of the mine, and the fact that the slab was the "center of operations", including the use of cutting torches, neither he nor any of his employees ever made any gas tests — (T. 64) (30a). As a matter of fact, even though he knew the contract required him

to use "extreme care", he made no provisions for gas tests even though his own foreman (decedent Ice) reminded him this was a "hot" mine and expressed great concern! — (T. 83-84) (30a-31a). And this was 3 to 4 weeks *before* the explosion — (T. 85) (32a). It was with knowledge of these facts that he and his employees continued the use of cutting torches, which discharge highly combustible gases and create flame. (T. 88-89) (33a-34a).

He admitted knowledge of small fires being started by his burning operations (T. 99) (34a-35a); that these in fact occurred on top of the slab, as well as in its immediate vicinity (T. 100) (36a); that the fire was "flying around" from the torches (T. 109) (37a); and that there was so much fire around the top of the slab that "it looked like a 4th of July exhibit." (T. 111) (37a).

We contend that Interstate's knowledge of these facts, together with knowledge that this was a gaseous mine, and the expressions of concern made to Sargeant by Mr. Ice, convict Interstate of negligence of the greatest degree, and can hardly be said to constitute the "extreme care" which they agreed to exercise.

Nowhere in the record is there anything to indicate the contract between the parties was intended to cover only surface prevention of fire, accident, etc.

Likewise, there is nothing in the contract between the parties that the "extreme care" required of Interstate did not cover the entire dismantling process, whether it be above or below the surface, and which has been interjected in the argument of petition, without any basis in fact.

We cannot pass without comment the statement on pages 5 and 6 of Petitioners' Brief, wherein they say:

> "In other words and contrary to all prior decisions elsewhere in the country on this point, the Fourth Circuit Court of Appeals now holds that an indemnity provision general and 'unqualified" in its terms, will be extended to protect the indemnitee against its own negligence and that in the Fourth Circuit, at least, it is now up to the *indemnitor* who did not prepare the agreement to limit or qualify the extent of indemnification in order to prevent its application to the indemnitee's own sole negligence!
>
> In no other case in this country has a court ever so held."

These statements grossly misinterpret the opinion of the Court of Appeals so that further comment need not be made, except to refer to the many cases hereinafter cited and quoted.

The Contract

The disputed contract between Eastern (Owner and Seller) and Interstate (Contractor and Purchaser), and the whole thereof, was filed with the complaint as Plaintiff's Exhibit No. 1, and for the complete contract reference is now made to that exhibit. We hereinafter quote the pertinent parts of the contract, which counsel for Respondent believe to be relevant to the matters in dispute (9a).

> "Purchaser will furnish all labor, supervision, equipment, tools, etc., required for performance of this work."
>
> "Purchaser will perform all work in such a manner so that he, his men, or his equipment will not delay or interfere with the normal operation of the mine, the new Coal Cleaning and Preparation Plant or any other "Eastern" activity required or taking place in or adjacent to the work site area, also will not block any roadway and/or railroad tracks."
>
> "Purchaser will prior to removal of equipment, etc., and prior to use of cutting torches, saws or other tools and/or equipment will remove all coal and/or coal dust from said equipment, building, etc., by hosing down all structures inside and out and will otherwise perform this work with all safety precautions including stand-by first aid fire fighting facilities and will exercise extreme care in the performance of this work to prevent fire and/or other damage or accident to property and persons of the Seller or others."

"Purchaser will keep someone at site for a reasonable time after cutting by torch or any other method and will make certain that all equipment and power are properly shut down or off before his employees leave the work site."

"Note: It is understood by both Purchaser and Seller that a serious fire could possibly put Federal No. 1 Mine out of operation for two years."

"Purchaser will have right to come on to Eastern's property to perform this work."

"Purchaser will protect and indemnify Eastern against loss or damage to property and injury and death to persons resulting from, arising out of or incident to the performance of this contract."

"Purchaser, during the period of this contract will maintain Bodily Injury Insurance in limits of not less than $500,000.00, *to cover any liability* including collapse arising out of removal and dismantling, clean-up work, loading and transporting of the items stated herein."

"Purchaser will also maintain Workmen's Compensation Insurance for any employees engaged in this activity."

"Certificates of Insurance for Bodily Injury and Property Damage and Workmen's Compensation will be submitted to Seller's Insurance Manager, Koppers Building, Pittsburgh 19, Pa., *before* Purchaser commences any activities."

From the above, the following should be clear, as the wording lends itself to but one interpretation:

1. Contractor was vested with the duty of supervision.
2. Contractor was to perform the work with all safety precautions.
3. Contractor was to use *extreme care* in the performance of the Contract.
4. Contractor was to protect and indemnify Owner against loss or damage to property and injury or death to persons resulting from, arising out of, or incident to the performance of the Contract.
5. Contractor, during the Contract, was to maintain bodily injury insurance in limits of not less than $500,000.00 per accident, and property damage insurance in limits of not less than $500,000.00 to cover *any liability* during its work.

Consider all of this, together with the fact that the Certificate of Insurance filed with plaintiff (copy of which is filed with Respondent's complaint as "Plaintiff's Exhibit No. 2) (17a), contained the following provision: "Policy condition as to Exclusions of Explosions and Collapse hazards are deleted and coverage thereon is included."

It must be kept in mind that the insurance certificate had to be filed with Respondent before the Petitioners started the work of dismantling, and it is reasonable to believe that Respondent had to accept and approve the same. (Our emphasis)

ARGUMENT BY POINTS

I. The Court of Appeals Acted in Harmony With the Erie Principles and Doctrine and Did Not Disregard West Virginia Law.

The *Erie* case, to which counsel for Petitioners refer, is *Erie R. R. Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), holding that federal courts in diversity cases may not disregard the substantive law of the state. *Associated Engineers, Inc. v. Job,* 370 F. 2d 633 (8th Cir. 1967).

The District Court adopted the position that the West Virginia case of *Bowlby-Harmon Lumber Co. v. Commodore Services, Inc.,* 144 W. Va. 239, 107 S. E. 2d 602 (1959), established West Virginia law on the subject. But in fact, at page 248 of the official report, the West Virginia Court, in pure dictum, observed:

> ". . . Moreover, to relieve a party from liability for his own negligence by contract, language to that effect must be clear and definite . . ."

The Court of Appeals gave intent consideration to this area of the case and found no West Virginia statute thereon and properly termed the Bowlby-Harmon case statement as dictum. The Court of Appeals found the contract language "clear and definite" and expressive of the intent and meaning of the parties. It was noted in the opinion that in West Virginia contracts of indemnity against one's own negligence are not against public policy. *Borderland Coal Co. v. Norfolk & W. R. R. Co.,* 87 W. Va. 339, 104 S. E. 624 (1920).

Moreover, in West Virginia, "When the provisions of a written instrument are clear and unambiguous they will be given full force and effect according to their plain terms and provisions." *Mace v. Carpenter & Lloyd,* 147 W. Va. 322, 127 S. E. 2d 254 (1962).

On page 11 of Petitioner's brief, counsel concludes that "the West Virginia Court requires 'clear and definite' language or 'clear and explicit' language, or 'clear terms'." This statement, it is respectfully submitted, is not well founded.

First, the Bowlby-Harmon case statement is clearly dictum. The West Virginia opinion refers to other cases from other jurisdictions by the introductory word "See". Two of these cases are then cited and quoted by counsel for Petitioners. One is *Carstens v. Western Pipe & Steel Co.,* 142 Wash. 259, 252 Pac. 939 (1927), which is a landlord-tenant lease contract. Counsel for Petitioners quote the old Washington case and include a quote therefrom, taken from the older English case, *Price & Co. v. Union Lighterage Co.,* 6 British Ruling Cases 119 (1904), which is a carrier case involving a contract for liability exempting loss or damage "which can be covered by insurance."

Counsel for Petitioners cite and quote from the Annotation in 175 A.L.R. 8 (1948). This Annotation springs from a Washington case, *Griffiths v. Henry Broderick, Inc.,* 27 Wash. 2d 901, 182 P. 2d 18 (1947), which is not favorable to Petitioners herein and is certainly the more current expression of the Washington Court.

Counsel for Petitioners also cite and quote from *Cerny-Pickas & Co. v. C. R. Jahn Company,* 4 Ill. App.

2d 164, 123 N. E. 2d 858 (1954), which was cited in the West Virginia case reference.

This Illinois case was decided by the First District Court of the Third Division of the intermediate appellate court system of the State. The case relates to landlord-tenant fire insurance coverage relations. The case was not published except in abstract form and the part quoted in Petitioner's brief is the publishing company's edited syllabus point, not appearing in the official reports. But the important fact to be considered is that the case was reversed in the Supreme Court of Illinois in *Cerny-Pickas & Co. v. C. R. Jahn Co.*, 7 Ill. 2d 393, 131 N. E. 2d 100 (1955). Point 2 of the syllabus and the Court's opinion clearly indicate the law of Illinois. We quote from pages 102 and 103 of the opinion:

> "The argument most strongly urged against exoneration of the lessee is that the lease does not in so many words provide that the lessee be free from liability for fires resulting from its own negligence. Of course, if the lease contained such an express provision, that would be the end of the matter. But because the contingency was not covered by express language, it does not follow that the instrument may not, when all of its provisions are considered, show that the parties themselves intended that the lessee should not be liable. That determination is to be made upon a consideration of the instrument as a whole. *MacAndrews & Forbes Co. v. Mechanical Mfg. Co.*, 367 Ill. 288, 11 N. E. 2d 382; *Llewellyn v. Board of Education*, 324 Ill. 254, 154 N. E. 889; *West v. Ranney Refrigerator Co.*, 261 Ill. 560, 104 N. E. 182; *Consolidated Coal Co. v. Peers*, 150 Ill. 344, 37 N. E. 937."

On page 19 of Petitioners' brief, question is raised as to the use and purpose of the indemnity provision in the contract if it be not to cover the very situation now in issue. Counsel use this approach to argue that the contract language is not "clear and definite" and therefore needs construction. The Washington Court in another case would not agree with this approach. *Union Pacific R. R. Co. v. Ross Transfer Co.*, 64 Wash. 2d 486, 392 P. 2d 450 (1964).

On this point the more recent Illinois case, *Patent Scaffolding Co. v. Standard Oil Co.*, 68 Ill. App. 2d 29, 215 N. E. 2d 1 (1966), 6 Syllabus:

> "Indemnity agreement by which subcontractor agreed to assume liability, be responsible for and indemnify and save harmless contractor and owner for any liability for death or injury to any person or persons or for any property damage or loss of use resulting from or in connection with performance of work specified, and which also provided that subcontractor would assume full responsibility for and hold contractor and owner harmless from any loss or damage to tools and equipment used by workmen and/or subcontractors, was intended to and did cover acts of negligence of indemnitees."

Note this recent Illinois case deals with somewhat comparable contract language. The Court does not require express language to indemnify the indemnitee but merely clear and explicit language. And the Illinois Court held the contract language was not ambiguous—was clear and explicit to meet the test—and did not require invocation of rules of construction. 4 Williston on Contracts. § 609 (3d ed. 1961). In *Associated Engi-*

neers, Inc. v. Job, supra, pages 649-650, this same analysis is developed. The able Circuit Court there points out that judicial references to the "clear" or "definite" or "unequivocal" language do not mean a requirement of express language, but language from which no doubt may be honorably raised as to meaning and intent of the parties. The Court notes also that this intent and meaning may be supplied by circumstances surrounding the making of the contract and the evident objectives of the parties thereto.

In *Moses-Ecco Company v. Roscoe-Ajax Corporation,* 115 U. S. App. D.C. 366, F.2d 685, 687, the Circuit Court of Appeals, Distr. of Columbia said:

> "Losses incurred by Roscoe-Ajax through its own negligence are not specifically included. And Moses-Ecco urges here, as it did below, that no intention to include such losses 'is otherwise clearly and unequivocally revealed.'
>
> The District Court concluded that the language of the indemnification agreement in the present case was so broad and sweeping as to plainly reveal an intent to encompass losses incurred in whole or in part by the negligence of the indemnitee. * * * We think the view of the District Court is correct."

A very realistic statement of the present-day law is found in the 1965 Proceedings of the American Bar Association's Section on Insurance, Negligence and Compensation law, page 269:

> "Insofar as the contract merely attempts to indemnify for the working contractor's own negligence, it is merely an adoption of the common law

principle of indemnity and is of no particular significance.

However, the Courts have held that a party may contract to hold another harmless from the indemnitee's own neglect and carelessness.

The leading case in New York on this question undoubtedly is *Thompson Starrett v. Otis Elevator*, 271 N. Y. 36. It was decided there that adult contracting parties could expressly contract that one party be liable for any damage sustained by the other, even though the entire fault might lie actively on the shoulders of the indemnitee. This case, which now seems to have general acceptance in most jurisdictions and in the Federal Courts, puts at rest the counter-argument that it was against public policy to pass the burden of paying for one's own wrong to another.

The court did, however, hedge this decision with the proviso that the contractual language must be express and unequivocal. (See *Broderick v. Cauldwell-Wingate Co. Inc.*, 281 A. D. 904; 120 NYS 2d 289, aff'd 305 N.Y. 872.)

However, as time passed the courts have gradually realized (*relaxed*) this rule so that no longer need the indemnification for one's own negligence be express or explicit as long as the intent is clear and unambiguous.

In *Salamy v. New York City Railroad Co.*, 1 A. D. 2d 27, use of a private crossing over defendant's tracks was allowed pursuant to a written agreement with the third-party defendant but it

contained no express covenant that the Licensees would be liable for the Railroad's own negligence. Yet, the court sustained a right to indemnity thereon saying:

'The intention is the thing which must appear clearly and unequivocally, however, and the agreement need not contain express language referring to the negligence of the indemnitee. The requirements of the rule are met if such an intention may be clearly implied from the language, purposes of the agreement, and all the surrounding facts and circumstances.'

See also:

Jordan v. City of New York, 3 A.D. 2d 507, aff'd without opinion, 5 N.Y. 2d 723; *Korzak v. Curry Auto Rental Inc.,* 17 Mis. 2d 685 (N. Y.); *Burke v. City of New York,* 2 N. Y. 2d 90; *General Electric Co. v. Hatzel & Buehler,* 19 A. D. 2d 40 (N. Y.) *Southern Pacific Co. v. Fellows,* 71 Pac. 2d 75."

As to how other jurisdictions and by far the majority thereof have construed language somewhat similar to the language of the contract under consideration, we will attempt very briefly to recite some of the same.

There is pertinent precedent in our own Fourth Circuit, and we find it in Judge Soper's written opinion in the case of *Atlantic Coast Line Railway Co. v. Robertson,* 214 F. 2d 746 at 753 (1954):

"* * * Certainly it is true when the injury is caused by the negligent act of the indemnitor; and

in this case the language is broad enough to cover loss for any injury caused by the negligence of either party to the contract for it specifies loss, injury, or damage of *any* and every character and howsoever caused that may be sustained in connection with the switching power of the Industry over the sidetrack."

We now submit some recent cases from the various Circuits, which we believe fully substantiate and support our position and which clearly indicate the thinking regarding Indemnity Agreements since 1948.

Second Circuit—*Rice v. Pennsylvania Railway Company* 202 Fed. 2d 861 (1953)

Third Circuit—*Seaboldt v. Pennsylvania Railway Company* 290 F. 2d 296 (1961)

Fourth Circuit—*Atlantic Coast Line Railways Co. v. Robertson* 214 F. 2d 746 (1954)

Fifth Circuit—*Birmingham v. Louisville & N. R. C. Co.* 316 F. 2d 858 (1964)

Jacksonville Terminal Co. v. Railway Express Agency 296 F. 2d 256 (1961)

Sixth Circuit—*General Acc. Fire & Life Assurance Corp. v. Smith Oby Co.,* 272 F. 2d 581 (1959)

Seventh Circuit—*Insurance Co. of N. A. v. Elgin, J. & E. Railway Co.,* 229 F. 2d 705 (1956)

Chicago & N. W. Railway Co. v. Chicago Fuel Co. 183 F. 2d 630 (1950)

Eighth Circuit—*Anthony v. L. & A. Railway Co.* 316 F. 2d 858 (1963)

Aluminum Co. v. Hully 200 F. 2d 257

Ninth Circuit—*Unitec Corp. v. Beatty Safeway Scaffold Co.* 358 F. 2d 470 (March 19, 1966)

Booth-Kelly Co. v. South Pacific Co., 183 F. 2d 902 (1950)

District of Columbia Court of Appeals—*Moses-Ecco Co. v. Roscoe Ajax Corp.*, 115 U. S. App. D. C. 366, 320 F. 2d 685 (1963)

An interesting case very recently decided, May 9, 1966, by the United States District Court E. D. Louisiana, but following Ohio law and precedent and particularly *General Accident Fire and Life Assurance Corp. Ltd. v. Smith and Oby Co.*, 272 F. 2d 581 (6th Circuit, 1959) and styled *United States Fid. and Guaranty Co. v. O'Neil Company*, reported in 254 F. Supp. 140, construed the following provision of an indemnity agreement:

"Article IX—(a). Sub-contractor shall indemnify Contractor against all claims for damages arising from accidents to persons or property occasioned by the Sub-contractor, his agents or employee; and Sub-contractor shall defend all suits brought against the Contractor on account of any such accidents and shall reimburse Contractor for any expense, including reasonable attorney's fee sustained by Contractor by reason of such accidents."

The Court in its opinion said:

"Under Ohio law contracts of indemnity purporting to relieve one from the results of his own

negligence are not contrary to public policy if the indemnity provisions express that intent in clear and unequivocal terms. *George H. Dingledy Lumber Co. v. Erie R. Co.*, 102 Ohio St. 236; 131 N.E. 723 (1921); *St. Paul Mercury Indemnity Co. v. Kopp, Ohio App.*, 1954, 121 N.E. 2d 23. The word "negligence" is not sacrosanct if the language expressed in the agreement shows a clear intention to hold the negligent indemnitee harmless. *General Acc. F. & L. Assur. Corp., Ltd. v. Smith & Oby Co.*, 6 Cir., 1959. 272 F. 2d 581, 77 A. L. R. 2d 1134; *George H. Dingledy Lumber Co. v. Erie R. Co., supra.;*" also

(2) "We are convinced that the parties to the present agreement, in clear and unequivocal language expressed the intention that Blount should be held harmless and indemnified against all claims for damages arising from accidents suffered by O'Neil's employees occasioned or caused by O'Neil or its employees, regardless of whether Blount was negligent."

A reading of the cases hereinabove set forth clearly will indicate that the language used in the contract of Petitioners and Respondent is much clearer and more definitive of the rights of the parties than the language used and construed therein to be broad enough to cover one, even in case of his own negligence. In other words, Respondent believes the contract to be unambiguous and the intent and purpose and the coverage is clear that Respondent was to be indemnified against any liability arising out of or incident to the Petitioners' performance of the contract.

II. The Court of Appeals Responded to Its Judicial Responsibilities in Reversing the District Court on Interpretation and Application of the Indemnity Contract Terms and Provisions and Did Not Disregard Federal Rules of Civil Procedure, Rule 52(a).

Rule 52(a) provides in part that "Findings of fact shall not be set aside unless clearly erroneous."

Counsel for Petitioners takes the position that the Court of Appeals violated this rule in disregarding the District Court's "significant and dispositive findings of fact, from which the District Court concluded otherwise." The Brief of Counsel for Petitioners, pages 14-15, itemizes seven "findings of fact" by the District Court. Findings 5, 6 and 7 are of more immediate concern, since they deal with application of the indemnity contract language.

At the outset, it may be noted that the basic problem in the case, as presented by counsel for Petitioners, is one of interpretation of the contract of indemnity.

On this point, *United States v. John McShain, Inc.*, 258 F. 2d 422 (D.C. Cir. 1958), certiorari denied 358 U.S. 832, 79 S. Ct. 52, 3 L. Ed. 2d 70 (1958), holds, pages 424-425:

> "The only question before the District Court was the question of the interpretation of written documents. That is a 'question of law' as to which this court is not bound by the 'clearly erroneous' provisions of Fed. Rules Civ. Proc. rule 52 (a) * * *"

Earlier in this Brief of Respondent the status of the West Virginia law on contract language require-

ments incident to indemnitee's indemnity has been discussed. The District Court adopted dictum from a West Virginia case and counsel for Petitioners in their brief have enlarged the language to state that the West Virginia law requires "clear and definite" and other comparable language in indemnity contracts to so indemnify the indemnitee. The Court of Appeals reviewed this area of the case and firmly held the District Court was wrong, using the words "We cannot agree". On page 17 of the Petitioners' brief, complaint is made that the Court of Appeals did not "label" the District Court's findings as clearly erroneous. The Court of Appeals holding is firm and plain and it appears unnecessary to argue on the magic of particular labels. In *Jacksonville Terminal Co. v. Railway Express Agency, Inc.*, 296 F. 2d 256 (5th Cir. 1961), the Court reversed a District Court decision but did not employ the words "clearly erroneous or unsupported by the record", as counsel for Petitioners argue is necessary. Rehearing was denied in the Jacksonville Terminal Co. case and certiorari was likewise denied, 369 U.S. 860, 82 S. Ct. 949, 8 L. Ed. 2d 18 (1962).

In *United Air Lines, Inc. v. Wiener*, 335 F. 2d 379 (9th Cir. 1964), the Court, at pages 401-402, rules it was not bound by the "clearly erroneous" language of Rule 52(a) when reviewing a District Court decision on issues relating to applicability of Nevada law and negligence of the parties involved.

The determination of the Court of Appeals is greatly distorted by way of improper and unjust inference on page 19 of Petitioners' Brief. It is there stated, "The Court of Appeals has thus held that *in all in-*

stances the *only* meaning to be given to imprecise indemnity provisions is to protect the indemnitee against his own negligence, since the common law through implied indemnification protects the indemnitee otherwise than for his own primary negligence". This is a very gross misstatement, improper deduction and an avoidance of the true and real adjudication of the Court of Appeals. The second paragraph on page 19 of Petitioners' brief is likewise an apparent avoidance of the true meaning and understanding of the opinion of the Court of Appeals.

CONCLUSION

For the foregoing reasons, your Respondent urges that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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